Filed 5/6/13 Boyko v. Millican CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN M. BOYKO et al.,

Plaintiffs, Cross-defendants, and Respondents,

v.

PATRICK R. MILLICAN,

Defendant, Cross-complainant, and Appellant;

SAILOR J. KENNEDY,

Defendant and Appellant.

G046746

(Super. Ct. No. 30-2009-00119018)

O P I N I O N

Appeal from a judgment and postjudgment orders of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed.

Patrick R. Millican, in pro. per., for Defendant, Cross-complainant, and Appellant Patrick R. Millican.

Sailor J. Kennedy, in pro. per., for Defendant and Appellant Sailor J. Kennedy.

Rodney W. Wickers for Plaintiff, Cross-defendant, and Respondent Mireille Robinson by her executor Robert Bird-Robinson.

No appearance for Plaintiff, Cross-defendant, and Respondent John M. Boyko.

* * *

Plaintiff Mireille Robinson lost $450,000 in a 2006 transaction facilitated by her then attorney, plaintiff John M. Boyko. Mireille passed away on July 31, 2010, but this case proceeded to trial to address the question of who, if anyone, should be held to account to Mireille's estate for her financial loss.[1]

Following a jury trial, the trial court entered judgment on the operative complaint in favor of Boyko and against defendant Patrick R. Millican in the amount of $765,543.99, which represented the initial $450,000 plus interest as specified in a promissory note signed by Millican in favor of Boyko (even though Mireille was the source of the funds). The court stated in a subsequent order that the "[d]amages awarded to Boyko shall be paid to" Mireille. Although the jury found defendant Sailor J. Kennedy took part in tortious wrongdoing that harmed plaintiffs, the judgment does not include an award of damages against Kennedy. With regard to Millican's cross-complaint against Boyko and Mireille, the court entered judgment in favor of cross-defendants Boyko and Mireille. Millican and Kennedy separately raise numerous contentions of error, but we affirm the judgment as well as various postjudgment orders.

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[1] We shall refer to the late Ms. Robinson as Mireille in this opinion because it will be necessary to differentiate her from other members of her family, whom we shall also refer to by first name.

FACTS

Pleadings

In the operative first amended complaint, plaintiffs Boyko and Mireille sued defendants Millican and Kennedy for breach of promissory note, judicial foreclosure, conspiracy to defraud, willful misconduct, conversion, and money had and received. Attached to the first amended complaint are copies of a promissory note in the amount of $500,000 and a deed of trust referencing a residential property in Laguna Niguel, California (the Property).[2] The note sets an interest rate of 11.11 percent; the $500,000 figure represents $450,000 in principal and $50,000 in interest due on June 1, 2007, one year after the effective date of the note. Both documents bear the purported signature of Millican (as the borrower and trustor), but not Kennedy. The loan documents indicate Boyko (and not Mireille) is the lender and the beneficiary of the deed of trust.

Plaintiffs alleged that Millican and Kennedy are "friends and joint business venturers." After the note and deed of trust were signed by Millican, Boyko wired the funds "to a bank account selected by the defendants." Neither Millican nor Kennedy repaid the loan. To support the tort allegations, plaintiffs further alleged that defendants had no "intent of repaying the proceeds of the requested loan, and instead agreed amongst themselves to have Kennedy negotiate the terms of the loan and to direct the payment of the funds of that loan to a bank account on their behalf, with Millican providing the . . . loan documents in order to hide their true intent to later deny the validity of that loan by asserting failure of consideration for the misdelivery of the loan proceeds to Kennedy without the knowledge or consent of Millican, and on that basis attempt to

[2] Apparently, as of the time of trial, the Property had been foreclosed upon by a senior deed of trust with no proceeds from the foreclosure sale accruing to plaintiffs. Thus, the judicial foreclosure cause of action was moot.

repudiate the validity of the Note and/or the Trust Deed which secured the loan." Plaintiffs alleged they had no knowledge of this "elaborate scheme and conspiracy between Millican and Kennedy."

Kennedy and Millican separately answered the first amended complaint. Both defendants denied the allegations of the first amended complaint. Kennedy pointed toward Boyko as the cause of any damages that may have been suffered by Mireille.

Millican filed a cross-complaint against Boyko and Mireille, asserting 16 causes of action (e.g., breach of contract, negligence, various permutations of fraud, indemnification). Millican alleged that he received unsolicited copies of a loan agreement, promissory note, and deed of trust from Boyko in June 2006. Millican admitted he signed and returned these documents to Boyko. Millican alleged that Boyko and Mireille breached their contract by failing to provide "the required consideration" (presumably the $450,000 loan) to Millican. Despite their failure to fund the loan, Boyko and Mireille recorded their deed of trust and thereby damaged Millican by creating a cloud on his title to the Property. In short, Millican alleged he was deceived by Boyko and other agents of Mireille. Millican did not file any causes of action against Kennedy or the actual recipient of the $450,000. The cross-complaint appends a copy of a mortgage loan agreement (which was not attached to the operative complaint), the promissory note, and the deed of trust. The documents contained within the mortgage loan agreement are generally consistent with the terms of the promissory note and deed of trust referenced in the complaint.

Evidence at Trial

Kennedy dropped out of school in the ninth grade. Kennedy worked in the insurance business for about six years and has been working in the "mortgage brokerage business" since the 1970s. Kennedy was convicted of a felony 30 years ago in connection with false statements on an application to a bank. Millican is a lawyer

licensed to practice law in Michigan and Ohio. Kennedy and Millican have known each other since approximately 1987. They are "very good friends" who talk perhaps once per week. Kennedy and members of his extended family resided at the Property (owned by Millican at the time) in 2006 and 2007.

In 2005 and 2006, Boyko represented entities affiliated with Millican and Kennedy in various litigation matters. Boyko was in daily communication with Kennedy and occasional communication with Millican. Kennedy told Boyko he "was in the process of attempting to develop a resort casino in Argentina." Kennedy said he "had invested several millions of his own dollars into the project." At the outset of Boyko's relationship with Kennedy, Kennedy had suggested he would compensate Boyko for his services as a lawyer with a "five-percent interest in any and all hotel projects that were successfully completed." Millican owned a half-percent interest in the casino project.

Mireille was approximately 85 years old in 2006. As a result of her age and health issues, Mireille signed a durable power of attorney in April 2006, designating Boyko and Robert Bird-Robinson (Robert) as co-agents. Mireille requested help investing her money.

In May 2006, Kennedy approached Boyko seeking an investor in the casino project. Boyko advised Robert about a proposed $450,000 loan and Robert agreed that the opportunity could be presented to Mireille. Boyko did not tell Robert the identity of the borrower or where he was sending the money, other than the general idea that the money would be used to pursue a project in South America. An essential component of Robert's consent to the loan was that it was secured. Kennedy responded to Boyko's concerns by offering the Property as security. "Kennedy was residing at the property. . . . But the Property was actually purchased by . . . Millican from . . . Kennedy's son approximately three months before this transaction occurred, so they had fresh appraisals in-hand . . . ." Millican agreed with this plan.

Boyko prepared the mortgage loan agreement, the promissory note, and the deed of trust. It was an "oversight" on Boyko's part not to insert Mireille's name as the lender/beneficiary rather than Boyko. Kennedy and his son assisted Millican with providing copies of appraisals to Boyko in April or May 2006. On June 5, 2006, Millican signed and initialed all the documents and sent them by overnight mail to Boyko. The promissory note stated that payment of $500,000 was due June 1, 2007. Although Boyko was identified as the lender in the loan documents, it was actually Mireille's money being loaned.

On June 8, 2006, Boyko received an e-mail from Kennedy providing wiring instructions for the money borrowed by Millican. The recipient of the wire transfer was Calstar Properties, LLC (Calstar).[3] Boyko knew "Kennedy was using this as a vehicle for funding his operations in terms of his investments." Boyko had previously performed legal work on behalf of Calstar. Boyko did not discuss this transfer of funds with Millican, but Millican had orally represented on an earlier occasion that Kennedy would handle loan negotiations and loan disbursement issues. Boyko did not have written authorization from Millican for sending the money to the Calstar account (or any other account). Nor did Boyko have written documentation of the alleged agency relationship between Kennedy and Millican. Boyko wired the money to the Calstar account.

Millican came to Kennedy for assistance in procuring a loan in early 2007. Kennedy identified Bernard Greenberg as a lender. Kennedy had a written authorization signed by Millican authorizing Kennedy to obtain a loan from Greenberg on Millican's

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[3] Calstar was based out of a residence in Laguna Niguel. Kennedy was a member of Calstar (a limited liability company) for six months after it was established. Kennedy continued to work as a consultant for Calstar. Kennedy's son was a member of Calstar and Kennedy's family owned 80 percent of Calstar. Some bank statements for Calstar accounts were addressed to the Property. Calstar had asked for loans from Millican. Moreover, a $50,000 check was made out to a trust account at Millican's law firm and Calstar wired $311,678 to Millican's law firm trust account. Calstar ceased to operate in 2009. Calstar destroyed its business records in 2009.

behalf. The written authorization stated "Kennedy shall have no authority to sign documents on behalf of Millican [or] receive any proceeds of the loan . . . ."

In December 2006 or January 2007, Kennedy advised Boyko that "they" needed additional funds and asked Boyko if Mireille's loan could be subordinated. Robert did not know any of the details of the subordination agreement (i.e., the borrower, the lender, the amount). But, on the advice of Boyko, Robert nonetheless agreed to the subordination agreement. Robert thought the loan was still secure. Boyko talked to Kennedy about the subordination agreement, not Millican. But Millican signed the subordination agreement.

In March 2007, Greenberg loaned Millican $330,000. The loan was secured by a deed of trust on the Property. This is the security interest to which Mireille's trust deed was subordinated. Greenberg had never met Millican; Kennedy negotiated the terms and conditions of the loan. Greenberg wired $50,000 of the money to Calstar at the direction of either Kennedy or Millican (but Greenberg does not specifically recall ever speaking to Millican). Greenberg received payments on the loan from a Calstar checking account. Greenberg did not receive additional payments after December 2007.

Debra Riehl was the escrow agent with regard to the Greenberg loan. Her office prepared the agreement subordinating the $500,000 Boyko loan to the Greenberg loan. The usual practice of her office was to send such a document to the parties. Riehl sent Millican the entire file, including the subordination agreement. Millican signed and returned all of the documents to Riehl, including the subordination agreement. Riehl's files do not include any notation of a communication from Millican indicating he did not receive the entire subordination agreement.

In June 2007, the $500,000 was not paid to Boyko or Mireille. Kennedy offered various excuses based on political or regulatory difficulties in Argentina. Boyko met with Mireille, Robert, and Randy Robinson (another son of Mireille). They agreed to

"take a wait-and-see attitude for a couple of months." Boyko continued to talk to Kennedy about the nonpayment of funds. The casino project never came to fruition.

On September 25, 2007, Boyko borrowed $300,000 from Calstar, secured by a deed of trust encumbering property owned by Boyko. The property was purchased by Boyko with a $1.1 million loan brokered by Kennedy earlier in September 2007.

On January 22 and February 15, 2009, Boyko wrote letters to Millican demanding repayment of the loan and threatening legal action. The first letter indicated he was writing on behalf of Mireille, "the holder of the note." Boyko sent the second letter because he realized it was in fact his name on the note, "even though [he] was holding it for her." Millican did not respond to the correspondence.

Special Verdict and Judgment

The jury was presented with a 76-page special verdict form. With regard to the first amended complaint, the jury found Mireille did not enter into a contract with either Kennedy or Millican. The jury found Boyko did not enter into a contract with Kennedy. But the jury found Boyko did enter into a contract with Millican and that Boyko performed his obligations under the contract. The jury also found Boyko was harmed by Millican's failure to perform the contract; the jury set damages in the amount of $450,000 principal, plus $50,000 interest and further interest accrued since June 1, 2007. Relatedly, the jury found Millican made a false promise to Boyko that was a substantial factor in harming Boyko, but the jury did not award any damages as part of its findings on this fraud cause of action. The jury also found Millican had converted Boyko's property in the amount of $450,000, plus $50,000 in interest.

The jury found that Kennedy was an ostensible agent for Millican (and Millican was an ostensible agent for Kennedy) in connection with the loan transaction and that "plaintiff [Mireille]/Boyko was harmed because he/she reasonably relied on his/her belief" that the agency relationships existed. But no damages were specifically

awarded in connection with these agency findings. Similarly, the jury found that Millican and Kennedy engaged in a conspiracy to commit promissory fraud, deceit, and/or concealment that was a substantial factor in causing harm to Mireille and Boyko, but awarded no damages to either Mireille or Boyko as a result of these findings.

As to the cross-complaint, the jury found that Boyko was negligent, but his negligence did not cause harm to Millican. The jury did not make any other findings that would potentially support liability on the cross-complaint.

The court entered judgment on January 27, 2012. The judgment is relatively clear in its first, second, and ninth paragraphs, but includes additional material less clear in its effect: "1. Plaintiff Boyko recover judgment on the merits against Defendant Millican in the amount of $450,000.00 plus $50,000 in interest from June 1, 2006 to June 1, 2007, plus interest of 10% from June 2, 2007, to November 15, 2011, totaling $765,543.99. . . . [¶] 2. Plaintiffs Boyko and [Mireille] recover interest on their respective judgments at a rate of 10% from the date of this Judgment against Defendant Millican, until paid. [¶] 3. Defendant Millican received money intended for Plaintiff Boyko, did not use it for the benefit of Plaintiff Boyko, and did not give it to Plaintiff Boyko. [¶] 4. Defendant Millican made a false promise causing harm to Plaintiff Boyko. [¶] 5. Defendant Millican converted Plaintiff Boyko's property harming him in the amount of $450,000, plus $50,000 interest from June 1, 2006 through June 1, 2007. [¶] 6. Defendant Kennedy, as agent for Defendant Millican, harmed Plaintiff Boyko and Plaintiff Robinson. [¶] 7. Defendants Millican and Kennedy conspired and intended to commit and did commit promissory fraud, deceit and/or concealment which was a substantial factor in causing harm to both Plaintiff Boyko and Plaintiff [Mireille]. [¶] 8. Cross Defendant Boyko was negligent, but his negligence was not a substantial factor in causing harm to . . . Millican or [Mireille]. [¶] 9. Cross Complainant Millican recover nothing from Cross Defendant Boyko and Cross Defendant [Mireille]." It appears the

$500,000 awarded for conversion in paragraph 5 is duplicative of the damages described in paragraph 1.

Postjudgment Orders

In a January 31, 2012 order, the court indicated "it would be unjust enrichment to allow Boyko to retain the damages because of the agency/employment relationship. Therefore, the court imposes a constructive trust and order damages awarded to Boyko be paid to [Mireille]." The court also found Boyko and Mireille were prevailing parties entitled to attorney fees and costs against defendants. In a separate section of its order, the court found Kennedy was not a prevailing party entitled to his costs. The court did not actually award costs or attorney fees as part of this order.

In a March 27, 2012 order, the court denied defendants' motions for judgment notwithstanding the verdict and their motions for a new trial. The court called for additional briefing on the question of attorney fees and costs; there is no order in the record actually awarding attorney fees or costs to plaintiffs. The court was concerned with the question of which costs and attorney fees could be awarded against Kennedy, in light of the fact that Millican was the only defendant to file a cross-complaint against plaintiffs.

DISCUSSION

Millican and Kennedy separately appeal the judgment and various orders entered by the court. Before addressing each of the issues properly before us, we mention several relevant general rules of appellate practice. "'A judgment . . . is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional

doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To demonstrate prejudicial error, an appellant must provide an adequate record of the trial court proceedings and include specific page citations in its briefs illustrating the error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Issues not specifically raised at trial are forfeited on appeal. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Moreover, issues not specifically raised in the appellate briefs are waived. (*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1410.)

With regard to the parties' multiple claims that the evidentiary record is insufficient to support factual findings underlying the judgment or posttrial orders, we apply the substantial evidence standard of review. "Under the substantial evidence standard of review, 'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.'" (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.)

I.

ISSUES RAISED BY MILLICAN

Denial of Nonsuit and Judgment Notwithstanding the Verdict Motions

Millican repeatedly contends throughout his brief that the court erred by denying his oral motion for nonsuit at the close of plaintiffs' case-in-chief. When Millican stated his intention to make a motion, the court indicated that "[i]f you're

making a motion for nonsuit, denied." Relatedly, Millican claims throughout his brief that the court erred by denying his motion for judgment notwithstanding the verdict.

"Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit." (Code Civ. Proc., § 581c, subd. (a).) "An order denying a motion for nonsuit, while not directly appealable, may be reviewed on appeal from the subsequent judgment for the plaintiff." (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1290.) "A defendant is entitled to nonsuit if the trial court determines as a matter of law that plaintiff's evidence, when viewed most favorably to the plaintiff under the substantial evidence test, is insufficient to permit a jury to find in his favor. [Citation.] We review an order denying a motion for nonsuit by using the same test as the trial court, and will affirm that order so long as there was substantial evidence to support the jury's verdict." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 713.)

"The court, before the expiration of its power to rule on a motion for a new trial . . . shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (Code Civ. Proc., § 629.) Our review of the court's denial of Millican's motion for judgment notwithstanding the verdict is the same as our review of the denial of the nonsuit motion. "Rulings on motions for nonsuit and for [judgment notwithstanding the verdict] are reviewed for the existence of substantial evidence." (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.)

Millican claims he was entitled to nonsuit or judgment notwithstanding the verdict against Boyko because of admissions by Boyko that he did not have any actual damages in the case. But the jury was entitled to infer that what Boyko meant by these

admissions was that any money technically owed to him as the holder/payee of the promissory note was actually owed to Mireille. (See Cal. U. Com. Code, § 3301 ["holder of the instrument" entitled to enforce instrument].) In essence, Boyko was the assignee of Mireille's right to enforce the note and deed of trust. (Cf. *Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 472-474 [loan servicer may commence judicial foreclosure with assignment of right to do so by deed of trust beneficiary].) It is unclear why Boyko did not simply assign the note and deed of trust to Mireille before this litigation began. Given Boyko's questionable practices as attorney for Mireille (e.g., placing her money in an overseas casino investment in which Boyko apparently held a stake, advising Mireille to subordinate her security interest without new consideration, failing to obtain clear written authorization from Millican for the disbursement of Mireille's funds to Calstar, borrowing money from Calstar after he had transferred Mireille's money to Calstar), joining Mireille and Boyko as plaintiffs in the action was an awkward fit. But that is beside the point for purposes of Millican's motion for nonsuit.

Relatedly, Millican makes the claim that there is no evidence he received any consideration from Boyko or Mireille, and that there was no evidence he conspired or had an agency relationship with Kennedy. But this ignores the inferences the jury fairly made from the direct and circumstantial evidence at trial. The jury was presented with two basic theories of the case: (1) Millican was Boyko's patsy, set up by Boyko with the promissory note and deed of trust to cover Boyko's tracks in case the speculative bet on the casino venture did not pay off; or (2) Boyko was Millican's and Kennedy's patsy, set up to believe the casino venture would pay off and the Property would provide security to the loan if it did not. The jury believed the latter theory and there was substantial evidence to support that theory. Millican had close connections with Kennedy and was connected in other ways with Calstar. Millican told Boyko that Kennedy would handle issues pertaining to the loan. Kennedy delivered appraisal documents necessary for the secured loan to proceed. Millican signed the loan documents but did not inquire with

Boyko as to why he did not receive the loan funds. Millican signed a subordination agreement referencing the Boyko deed of trust in 2007. The jury was entitled to disbelieve the testimony of Millican and Kennedy to the extent their testimony suggested that Millican had nothing to do with the $450,000 being transferred to Calstar for use in the casino investment. Based on the evidence presented, the jury was entitled to agree with plaintiffs' contention that Millican received Mireille's $450,000.

Millican also claims the court erred by supposedly refusing to allow him to argue his motion for nonsuit. Millican does not cite any authority for the proposition that a court must allow a party to present argument on an oral nonsuit motion. And even if the court should have allowed argument, Millican cannot demonstrate prejudice as his motion was not meritorious.

Order Allowing Mireille to Amend Responses to Requests for Admission

Millican also claims the court erred by refusing to grant a new trial. "[W]e review an order denying a new trial motion under the abuse of discretion standard. However, in doing so, we must review the entire record to determine independently whether there were grounds for granting the motion." (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 733.) A new trial may be granted based on, among other factors, "1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶] . . . [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] . . . [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application." (Code Civ. Proc., § 657.)

Millican's first asserted ground for new trial is that the court allowed Mireille at trial to withdraw two admissions she made during discovery. On November 4,

2010, Millican propounded a set of 151 requests for admission. (Code Civ. Proc., § 2033.010 et seq.) Mireille responded on December 8, 2010 (although the record does not include a signature under oath by Mireille's representative).

Mireille admitted request numbers 65 and 72. Request No. 65 asked Mireille to "[a]dmit the allegation(s) contained in paragraph 77 of Patrick R. Millican's Cross-Complaint." Paragraph 77 of the cross-complaint, in turn, stated "That [Mireille] was to provide a $450,000.00 investment in the venture in return for the interest in the venture." Request No. 72 asked Mireille to "[a]dmit the allegation(s) contained in paragraph 84 of Patrick R. Millican's Cross-Complaint." Paragraph 84 of the cross-complaint, in turn, stated "That at the time that [Boyko] sent the [loan documents] to MILLICAN, [Mireille and Boyko] intended to deceive MILLICAN into believing that after they received the signed [loan documents] back from MILLICAN, that he would receive the $450,000 cash consideration that the NOTE called for."

Millican read these admissions into the record at trial. Mireille subsequently moved to withdraw or amend her responses pursuant to Code of Civil Procedure section 2033.300. Mireille and her counsel attached their declarations to the motion, indicating they had inadvertently responded "admit" to request numbers 65 and 72. The court granted Mireille's motion. The court cited the confusing nature of the requests for admission (in that they referenced the cross-complaint rather than simply stating an alleged fact to admit or deny). The court found Millican was not prejudiced because Mireille's other discovery responses and her theory of the case at trial was diametrically opposed to these admissions.

"A party may withdraw or amend an admission made in response to a request for admission only on leave of court granted after notice to all parties." (Code Civ. Proc., § 2033.300, subd. (a).) "The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will

not be substantially prejudiced in maintaining that party's action or defense on the merits." (*Id*., subd. (b).)

We review the court's ruling for an abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420-1421.) "The trial court's discretion in ruling on a motion to withdraw or amend an admission is not unlimited, but must be exercised in conformity with the spirit of the law and in a manner that serves the interests of justice. Because the law strongly favors trial and disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking relief. Accordingly, the court's discretion to deny a motion under the statute is limited to circumstances where it is clear that the mistake, inadvertence, or neglect was inexcusable, or where it is clear that the withdrawal or amendment would substantially prejudice the party who obtained the admission in maintaining that party's action or defense on the merits." (*Id*. at pp. 1420-1421.)

The court was within its discretion in granting Mireille's motion. Millican propounded an excessive (Code Civ. Proc., § 2033.030, subd. (a) [party only entitled to serve 35 requests for admission as a "matter of right"])[4] number of requests for admission, which were improper in that they required the responding party to refer to another document (Code Civ. Proc., § 2033.060, subd. (d) ["Each request for admission shall be full and complete in and of itself"]). Although great care should be taken in preparing responses to requests for admission, it is plausible that Mireille inadvertently admitted these requests. And given that the parties were in the middle of a trial in which the central issue was whether Millican was a victim or villain with regard to the

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[4] Millican did prepare a declaration (Code Civ. Proc., § 2033.050) stating under oath the supposed basis for needing 151 requests for admission (viz., "because of the nature and quantity of the existing issues and the potential issues involved in this action"), but in fact the requests represent mindless cross-referencing of paragraphs in the cross-complaint without any work by Millican to craft an appropriate number of non-duplicative requests.

$450,000, it is equally plausible for the court to have posited that Millican was not prejudiced by not being able to use these inadvertent admissions. It is not as though Millican was unaware of Mireille's actual position as to what occurred going into trial.

Millican claims in his appellate briefs that the motion was untimely, in that it came after the close of discovery. (See Code Civ. Proc., § 2024.020, subd. (a) [discovery cut off for "motions concerning discovery" is "on or before the 15th day, before the date initially set for the trial of the action"].) But Millican forfeited this argument, as Millican did not raise with the trial court an argument that a motion to withdraw or amend admissions cannot occur after the discovery cut-off date. In opposing the motion at trial, Millican only argued he would be prejudiced if the motion were granted because he rested his case in reliance on the admissions helping his case at trial. In granting the motion, the court explicitly authorized Millican to reopen his case with regard to the subject area of the admissions.

We also note the admissions at issue did not represent the end of the case even if the court had ruled that the admissions must stand. Mireille first admitted she "was to provide a $450,000.00 investment in the venture in return for the interest in the venture." While Millican contends the use of the words "venture" and "interest" (rather than "loan," "note," and "deed of trust") suggests Mireille was admitting to Millican's characterization of the transaction, the request is vague and ambiguous in that it is plausible that Mireille and her attorney meant simply she admitted she provided $450,000 in exchange for her contractual rights under the note and deed of trust.

Mireille also admitted "[t]hat at the time that [Boyko] . . . sent the [loan documents] to MILLICAN, [Mireille and Boyko] intended to deceive MILLICAN into believing that after they received the signed [loan documents] back from MILLICAN, that he would receive the $450,000 cash consideration that the NOTE called for." Obviously, an admission that Mireille and Boyko "intended to deceive" Millican was harmful to plaintiffs' case. But given the reality of the case, any such "deception" was

beside the point if the jury believed Millican actually did receive the funds (in the sense that he approved of the destination of the $450,000 wire transfer). Mireille did not admit that Millican did not receive the funds. It is likely that through inadvertence Mireille and her attorney did not notice the word "deceive" in the request for admission, as Mireille certainly did admit that she and Boyko intended to convince Millican to believe that after they received the signed loan documents, the $450,000 cash consideration would be transmitted to Millican's preferred destination (the casino project).

Agency Instructions

In the operative complaint, plaintiffs alleged that "[p]ursuant to written instructions authorized by Millican and delivered by Kennedy to Boyko, Boyko caused the proceeds of the [$450,000] loan to be wired to a bank account selected by the defendants, and each of them." As explained in the statement of facts, Boyko received an e-mail from Kennedy providing wiring instructions for the money borrowed by Millican. The account was under the name Calstar. Boyko did not discuss this transfer of funds with Millican, but understood based on prior conversations with Millican and the nature of loan negotiations that Kennedy could designate where the funds should be transferred. Obviously, the gist of plaintiffs' breach of contract action against Millican was that Kennedy was Millican's agent and that Kennedy was authorized to direct the disbursement of funds.

But in his discovery response to a request for admission, Boyko apparently admitted "that in the year 2006, Boyko had no oral authority from Millican making Kennedy Millican's agent for the loan." This admission was read into the record by Millican following his cross-examination of Boyko. Millican does not cite to a copy of the actual discovery response in his brief.

Millican asserts the court erred by instructing the jury on agency issues and including agency questions in the special verdict with regard to plaintiffs' causes of

action. Millican claims he was entitled to a new trial because of this purported error. But Millican ignores the fact that the jury was instructed on the theory of ostensible agency, not actual agency.[5] "An agency is either actual or ostensible." (Civ. Code, § 2298.) "An agency is actual when the agent is really employed by the principal." (Civ. Code, § 2299.) "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.)

Here, even holding Boyko to his ill-advised admission as the jury was instructed to do, the jury was entitled to make special verdict findings that Kennedy was Millican's ostensible agent. Boyko could reasonably have believed the agency existed based on the close relationship between Kennedy and Millican, past dealings between the three men (Boyko, Kennedy, and Millican), Kennedy and his family residing at the Property owned by Millican that served as the security for the transaction, Kennedy's performance of various tasks for Millican (e.g., providing the appraisals for the Property), Kennedy's provision of the wiring instructions for the loan proceeds, the lack of other instructions from Millican for the loan proceeds, and the lack of inquiry by Millican into the whereabouts of the loan proceeds. The evidence concerning the Greenberg loan circumstantially supported the jury's finding that an ostensible agency existed, in that Kennedy acted as Millican's actual agent for purposes of the Greenberg loan, which was a nearly identical transaction to the Mireille loan.

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[5] CACI No. 3709, as provided to the jury, stated in relevant part: "Plaintiffs claim that Defendant Millican is responsible for Defendant Kennedy's conduct because he was Defendant Millican's apparent agent. To establish this claim, Plaintiff must prove all of the following: [¶] 1. That Defendant Millican intentionally or carelessly created the impression that Defendant Kennedy was Defendant Millican's agent; [¶] 2. That Plaintiff reasonably believed that Defendant Kennedy was Defendant Millican's agent; and [¶] 3. That Plaintiff was harmed because he/she reasonably relied on his/her belief."

Riehl as Surprise Witness

Millican next contends the court should have granted a new trial because the escrow agent, Riehl, was not on the pretrial witness list and was subpoenaed during trial. Riehl was not called to testify during plaintiffs' case-in-chief. Instead, she was called to testify by Boyko during his rebuttal case. Riehl's testimony, if believed, tended to undermine prior testimony of Millican that Millican had never seen the entire subordination agreement from the Greenberg loan (even though Millican admitted signing the agreement). Thus, Riehl's testimony and her Greenberg loan file were relevant to an issue in dispute and admissible as impeachment evidence (Evid. Code, § 780, subd. (i)). Millican cites no authority for the proposition that a court abuses its discretion by allowing a party to call a percipient witness at trial to impeach and rebut a party opponent's testimony, notwithstanding the absence of that witness on the witness list. Nor does Millican cite any authority for the proposition that it is unfair surprise under Code of Civil Procedure section 657, subdivision (3), to allow the testimony of Riehl under the circumstances presented. We reject Millican's argument.

Exclusion of Evidence

Millican also asserts the court erred by excluding evidence pertaining to Mireille exploring the possibility of a separate malpractice action by Mireille against Boyko, and by refusing to grant a new trial based on this allegedly wrongful exclusion of evidence. The court cited Evidence Code section 352 in granting Boyko's objection to such evidence. Trial courts have broad discretion to exclude evidence under Evidence Code section 352 to avoid confusing the issues and to prevent the undue consumption of time. (See *Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14.) Millican provides no citations to legal authority or reasoned argument in support of his bare contention that he is entitled to a new trial because of this evidentiary ruling. Millican therefore waives this issue on appeal. (See *Cahill v. San Diego Gas & Elec. Co.* (2011)

194 Cal.App.4th 939, 956 [appellate briefs must be supported by reasoned argument and citations to authority or else issue is waived].) Even if the issue were not waived, we would conclude the court was within its discretion when it excluded evidence of an action by Mireille against Boyko.

Newly Discovered Evidence

Relatedly, Millican claims he was entitled to a new trial because of newly discovered evidence relating to Mireille's action against Boyko. Apparently, the operative complaint in Mireille's action alleges that Boyko harmed Mireille by losing her $450,000, the same money at issue in the instant case. Furthermore, Millican discovered that Boyko settled with Mireille for $350,000.

Millican claims this evidence "and inferences to be drawn from it could have changed the whole outcome of this case." But he provides no reasoned argument or citation to authority for his argument that the court was required to admit this evidence. Obviously, the court's previously-discussed ruling under Evidence Code section 352 would apply equally to these materials. Thus, Millican waives this issue on appeal as well.

We also note that Evidence Code section 1152, subdivision (a), precludes the introduction of "[e]vidence that a person has, in compromise . . . , furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof." There is a *theoretical* possibility that Mireille could be overcompensated for her damages, were Millican to satisfy the judgment in full to Boyko. Boyko would be required to turn over the amount paid by Millican. If Boyko had already paid $350,000 in settlement funds to Mireille, she potentially would have obtained a double recovery. But this contingency is a problem for Boyko to address, not Millican. The jury found Millican responsible for

the loss of Mireille's $450,000 (plus interest) and he must satisfy this judgment. Mireille did not sue Boyko in this action and any claim the two actions should have been consolidated is forfeited.

Order Deeming Plaintiffs to be Prevailing Parties

Millican next claims the court erred by deeming plaintiffs to be the prevailing parties in this action under Code of Civil Procedure section 1032, subdivision (a)(4). A review of this portion of Millican's brief reveals that his argument is entirely contingent on this court agreeing with one or more of his previous grounds for reversing the judgment. As we affirm the judgment against Millican, we reject Millican's argument that he is the true prevailing party in this action.

Creation of Constructive Trust in Favor of Mireille

Finally, Millican alleges the court erred by ordering that any proceeds of the judgment received by Boyko must be held in trust for Mireille. But it was Boyko, not Millican, who was aggrieved by this order. Boyko did not appeal the court's postjudgment order; indeed, Boyko did not file any documents with this court. Millican does not have standing to pursue this argument on appeal. (See Code Civ. Proc., § 902 ["Any party aggrieved may appeal in the cases prescribed in this title"]; *In re FairWageLaw* (2009) 176 Cal.App.4th 279, 285 [to be cognizable on appeal, "'the aggrieved party's interest must be immediate, pecuniary and substantial, and not merely a nominal or remote consequence of the judgment'"]; *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1026 ["Only a party aggrieved by a judgment or order has standing to appeal the judgment or order"].)

II.

ISSUES RAISED BY KENNEDY

Kennedy appears to have dodged a bullet in this case. The jury found he was Millican's agent and that he and Millican were engaged in a conspiracy to defraud plaintiffs that harmed plaintiffs. But the jury found plaintiffs suffered no loss by reason of this conduct. Accordingly, the judgment does not hold Kennedy liable for the plaintiffs' damages. Moreover, plaintiffs did not appeal the judgment. Nevertheless, Kennedy appeals the judgment.

Nearly all of Kennedy's contentions on appeal duplicate the arguments made by Millican. Kennedy claims he was entitled to nonsuit or judgment notwithstanding the verdict against both plaintiffs. Kennedy claims the court prejudicially erred by allowing Mireille to withdraw her responses to Millican's requests for admission. Kennedy claims he was entitled to judgment as a matter of law with regard to agency allegations. We refer to our analysis above with regard to these contentions and reject Kennedy's assertions on appeal. We also note that, with regard to some issues, Kennedy is not an aggrieved party and therefore may not complain on appeal. However, Kennedy does raise one issue requiring additional analysis.

Prevailing Party Analysis

The court found plaintiffs were the prevailing parties in this action. Kennedy asserts that, contrary to the court's postjudgment ruling, he was the prevailing party vis-à-vis plaintiffs for purposes of his costs.[6] We review prevailing party

[6] As self-represented parties, Kennedy, Millican, and Boyko could not hope to recover attorney fees under Civil Code section 1717. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 292.)

determinations for an abuse of discretion. (*Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 852.)

"'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (Code Civ. Proc., § 1032, subd. (a)(4).) "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).)

Unlike Millican, the judgment does not order Kennedy to pay damages to Boyko. Also unlike Millican, Kennedy did not file an unsuccessful cross-complaint against Boyko or Mireille. Under ordinary circumstances, Kennedy would be the prevailing party for purposes of Code of Civil Procedure sections 1032. (See *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1549-1551 [plaintiffs failed to obtain any relief from defendants and defendants were therefore prevailing parties].) Kennedy would therefore be entitled to his costs from plaintiffs, not vice versa.

The question presented is whether the court abused its discretion by deviating from this result under the unique circumstances of this case. Judgment was entered stating that "Defendant Kennedy, as agent for Defendant Millican, harmed Plaintiff Boyko and Plaintiff Robinson" and "Defendants Millican and Kennedy conspired and intended to commit and did commit promissory fraud, deceit and/or concealment which was a substantial factor in causing harm to both Plaintiff Boyko and Plaintiff [Mireille]." Plaintiffs obtained relief in the action, but the tangible portion of the

judgment came only against Millican. Based on the jury's special verdict findings, one would think Kennedy and Millican would be jointly and severally liable for some or all of the damages awarded. For whatever reason, that did not happen. Neither plaintiff moved for a new trial (or appealed the judgment for that matter). The court was faced with a paradox. The jury apparently agreed that Kennedy played a crucial role in a fraud perpetrated on plaintiffs. But the judgment did not award damages against Kennedy.

Two distinct doctrines converge to support the court's exercise of discretion under the unique circumstances of this case. First, this case is comparable to situations in which plaintiffs, not defendants, were found to be prevailing parties under Code of Civil Procedure section 1032, subdivision (a)(4), despite the lack of a damages award against the applicable defendants in the judgment. (See *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 213-215; *Pirkig v. Dennis* (1989) 215 Cal.App.3d 1560, 1565-1568.) In both of these cases, damages were awarded to plaintiffs at trial, but a monetary judgment was not entered against particular defendants because other defendants had already satisfied the judgment by settling with plaintiffs. (*Zamora*, at pp. 213-214 [jury found damages of $222,282, but "after crediting the aggregate amount of settlements with other defendants, the court entered judgments against [the appealing defendant] for $0"]; *Pirkig*, at p. 1566 ["The only reason respondents failed to obtain a net monetary recovery [against appealing defendants] at the second trial was because [plaintiffs] settled before trial with [other defendants] for a greater amount than awarded by the second court"].)[7]

[7] Our Supreme Court subsequently made clear that "a plaintiff whose damage award is offset to zero by a prior settlement does not *categorically* qualify as a prevailing party ('the party with a net monetary recovery') as a matter of law. Unless a party otherwise fits into one of the remaining three categories of prevailing party under [Code of Civil Procedure] section 1032[, subdivision] (a)(4), a trial court will have the *discretion* to make the determination as to a prevailing party under the section." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1338, fn. 4.)

Second, Millican and Kennedy shared a unity of interest in defending the plaintiffs' suit. Cases have recognized that parties that are "united in interest and shared the same counsel" at trial are not entitled to the strict application of the definition of "prevailing party" in Code of Civil Procedure section 1032, subdivision (a)(4). (*Slavin v. Fink* (1994) 25 Cal.App.4th 722, 726; see also *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1075 ["where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party"].) Millican and Kennedy, longtime friends and business associates, were found by the jury to have conspired to commit fraud against plaintiffs. Millican and Kennedy, representing themselves in this litigation, pursued similar theories of the case at trial and never sued each other for indemnity. Millican is an attorney and Kennedy is a layman. Our review of the record and the appellate briefs suggests that Kennedy followed Millican's lead in filing legal documents. Although this is not a clear cut case in which Millican and Kennedy hired the same attorney and co-filed pleadings, it is analogous to such cases.

In sum, the unique circumstances of the case before us supported the court's refusal to classify Kennedy as a prevailing party despite his success in avoiding a monetary judgment against him. Plaintiffs achieved their litigation goal of obtaining a monetary judgment to recover Mireille's losses. The jury classified Kennedy as a tortfeasor who harmed plaintiffs, but somehow did not cause any monetary loss. Kennedy presented a unified litigation front with Millican, who was held liable for damages in the judgment.

DISPOSITION

The judgment and postjudgment orders are affirmed. Robert Bird-Robinson in his capacity as executor of the estate of Mireille Robinson, shall recover

costs incurred on appeal. A copy of this opinion shall be transmitted to the State Bar of California pursuant to California Code of Judicial Ethics, Canon 3(D)(2), as our review of attorney John Boyko's testimony suggests multiple violations of the Rules of Professional Conduct may have occurred with regard to his representation of Mireille Robinson and the executor of her estate.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.